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8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SAN JOSE DIVISION

12 KAHEAL PARRISH,

13 C 11-1438 LHK (PR)

14 Plaintiff,

15 **DEFENDANTS' REPLY REGARDING**
SUMMARY-JUDGMENT MOTION

16 v.

17 A. SOLIS, et al.,

18 Defendants.

[No hearing per May 23, 2011 order of
service]

19 INTRODUCTION

20 Plaintiff Kaheal Parrish offers no evidence in opposition to Defendants' summary-judgment
21 motion. Instead, he requests that the Court postpone ruling on Defendants' motion until he can
22 conduct discovery. He seeks Defendants' personnel files and inmates' complaints, declarations,
23 and grievances. Because Defendants argued in their motion that they are entitled to qualified
24 immunity, this Court should decide this threshold issue before subjecting Defendants to Parrish's
25 demands.

26 And even if Defendants' invocation of qualified immunity does not bar discovery, Parrish
27 has not shown good cause for it. Parrish has not conducted any discovery in the eleven months

1 since this case was filed, although this Court instructed him that he could. If he obtains the
 2 evidence he seeks, it will not create a material issue of fact because it is inadmissible character
 3 evidence and hearsay. And Parrish fails to identify specifically what he seeks and how long it
 4 will take him to obtain it.

5 Because Parrish has not created a triable issue of material fact in opposition to Defendants'
 6 summary-judgment, and because he has not shown good cause to postpone ruling on the motion,
 7 this Court should grant Defendants' motion.

8 **ARGUMENT**

9 **I. BECAUSE PARRISH HAS NOT PROVIDED ANY EVIDENCE IN OPPOSITION TO DEFENDANTS'
 10 SUMMARY-JUDGMENT MOTION, THIS COURT SHOULD GRANT THE MOTION.**

11 Parrish requests that this Court deny Defendants' summary-judgment motion. But he
 12 presents no evidence in opposition to the motion.

13 In its screening of Parrish's complaint, this Court gave Parrish the notice required by *Rand*
 14 *v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc), which advises a pro se litigant that he
 15 must provide specific facts, including facts contained in discovery responses and sworn testimony,
 16 to oppose a summary-judgment motion. (Order of Service, dated May 23, 2011, at 4:1–5:2.)

17 Defendants proved in their summary-judgment motion that Defendants Machuca, Powell,
 18 and Sanudo acted reasonably by using the least-possible force to remove Parrish from his cell and
 19 protect him from himself. (Defs.' Mot. Summ. J. 2:23–11:26.) And Defendants proved that
 20 Defendants Salazar, Muniz, Hedrick and Solis were not involved in Parrish's removal from his
 21 cell and were not responsible for approving Salinas Valley's regulations. (*Id.*) Parrish has
 22 provided no facts to dispute this.

23 Because Defendants have established that they are entitled to judgment as a matter of law,
 24 and Parrish has not provided any contrary evidence, this Court should grant the motion.

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1 **II. THIS COURT SHOULD STAY DISCOVERY PENDING RULING ON DEFENDANTS'**
 2 **SUMMARY-JUDGMENT MOTION.**

3 For the first time, Parrish seeks to conduct discovery to oppose Defendants' summary-
 4 judgment motion. But this Court should first determine whether Defendants are entitled to
 5 qualified immunity before authorizing Parrish's eleventh-hour request.

6 A district court should stay discovery until the threshold question of qualified immunity is
 7 settled. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Anderson v. Creighton*, 483 U.S. 635,
 8 646 n.6 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson*, the Court
 9 reiterated that “[o]ne of the purposes of the *Harlow* qualified immunity standard is to protect
 10 public officials from the broad-ranging discovery that can be peculiarly disruptive of effective
 11 government.” *Anderson*, 483 U.S. at 646 (internal quotation marks omitted).

12 Defendants argue in their summary-judgment motion that even if Defendants used
 13 excessive force, they are entitled to qualified immunity because reasonable prison officials would
 14 not have believed that they violated a clearly established constitutional right. Allowing Parrish to
 15 engage in discovery at this time would defeat the basis for qualified immunity by subjecting
 16 Defendants to premature broad-ranging discovery. A discovery stay would allow the Court to
 17 rule on qualified immunity before Defendants respond to discovery, including discovery motions.
 18 Because the issue of qualified immunity requires a stay of discovery, this Court should deny
 19 Parrish's request to postpone ruling on Defendants' summary-judgment motion.

20 **III. EVEN IF PARRISH IS NOT BARRED FROM CONDUCTING DISCOVERY, HIS**
 21 **DISCOVERY REQUEST IS TOO LATE.**

22 If the party opposing summary judgment presents a declaration showing that it cannot
 23 present facts justifying its opposition, the court may deny a summary-judgment motion or defer
 24 ruling on it. Fed. R. Civ. P. 56(d). To justify denial or postponement, the opposing party's
 25 declaration must show: (1) a likelihood that evidence creating a triable issue of material fact
 26 exists; (2) specifically why evidence was not obtained or discovered earlier; (3) the steps the
 27 opposing party proposes to obtain the necessary evidence within a reasonable time; and (4) how

1 the evidence is enough to defeat summary judgment. *Tatum v. S.F.*, 441 F.3d 1090, 1101 (9th Cir.
 2 2006).

3 **A. Parrish Has Not Shown That the Evidence he Seeks Will Create a Triable
 4 Issue of Material Fact.**

5 Parrish seeks Defendants' personnel files, and inmates' complaints, grievances, and
 6 declarations. But he provides no specific reasons why these are necessary, as Rule 56(d) requires.

7 The opposing party must state how he reasonably expects that the evidence will create a
 8 triable issue. *Moss v. United States Secret Serv.*, 572 F.3d 962, 966 n.3 (9th Cir. 2009). Parrish
 9 merely states in his declaration that he needs discovery to prove that Defendants Machuca, Powell,
 10 and Sanudo used excessive force against him, that Defendant Salazar covers up constitutional
 11 violations, and that Defendants Solis, Hedrick and Muniz ignore cover-ups. (Decl. Parrish Supp.
 12 Opp. Defs.' Mot. Summ. J. (Decl. Parrish ¶¶ 3-5.) Because Parrish failed to specifically declare
 13 how this requested discovery will allow him to create a triable issue of material fact, this Court
 14 must deny his Rule 56(d) request.

15 And even if this Court considers the unsworn statements in Parrish's memorandum in
 16 support of his Rule 56(d) request, these statements did not specifically show how the evidence
 17 would create a triable issue of material fact, and the evidence itself is hearsay and inadmissible
 18 character evidence.

19 Hearsay is any statement by an out-of-court witness offered to prove the truthfulness of the
 20 statement. Fed. R. Civ. P. 801(c). Evidence of a person's character is not admissible to prove that
 21 on a particular occasion the person acted in accordance with his character. Fed. R. Evid.
 22 404(a)(1). And evidence of a person's wrongdoing is not admissible to prove that the person
 23 committed similar wrongdoing on another occasion. Fed. R. Evid. 404(b)(1).

24 In his memorandum, Parrish seeks Defendants' personnel records and fellow inmates'
 25 declarations, citizens' complaints, and administrative grievances, which he alleges will show that
 26 Defendants used excessive force against Parrish. (Pl.'s Opp. Defs.' Mot. Summ. J. (Pl.'s Opp.)
 27 4-11.) Parrish evidently believes that statements in these documents will corroborate his
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1 statements in this case. Even if this were true, the statements are inadmissible hearsay. *See* Fed.
 2 R. Evid. 801.

3 And even if the statements allegedly contained in these documents were not inadmissible
 4 hearsay, Parrish is barred from using the documents to show that Defendants used excessive
 5 against him because they used excessive force against other inmates. *See* Fed. R. Evid. 404.

6 Because Parrish provides no sworn testimony showing that he needs the discovery, and the
 7 his non-sworn statements show that the evidence he seeks would be inadmissible, this Court
 8 should deny Parrish's request and grant Defendants' summary-judgment motion.

9 **B. Parrish Never Tried to Obtain the Documents He Now Seeks.**

10 Parrish argues that he was unable to obtain inmate declarations "because of prison
 11 security," (Decl. Parrish ¶ 2) and unable to conduct discovery because "the court has not yet set a
 12 discovery schedule" (Pl.'s Opp. 3:21–27). But all prisoners are subject to prison security, and this
 13 Court expressly informed Parrish that he could conduct discovery nearly ten months ago.

14 The party opposing summary judgment and seeking to postpone the court's ruling on the
 15 motion must show specifically why evidence was not obtained or discovered earlier. *Tatum.*, 441
 16 F.3d at 1101. Parrish provides no reason why prison security has prevented him from obtaining
 17 the inmates' declarations. (See Decl. Parrish ¶ 2.) He faults this Court for not authorizing
 18 discovery (Pl.'s Opp. 3:21–24), but this Court's screening order stated that Parrish could conduct
 19 discovery. (Order of Service, dated May 23, 2011, at 5:10–11 ("Discovery may be conducted in
 20 accordance with the Federal Rules of Civil Procedure. No further court order is required before
 21 the parties may conduct discovery").) And although this case was filed in March 2011, Parrish
 22 has not yet conducted any discovery. (Decl. Kenny Supp. Reply Re Mot. Summ. J. (Decl. Kenny)
 23 ¶ 2.)

24 Because Parrish has not shown good cause to deny or postpone ruling on Defendants'
 25 summary-judgment motion, this Court should grant the motion.

26 **C. Parrish Provides No Plan for Completing Discovery.**

27 Parrish seeks additional time to conduct discovery, but he provides no plan for conducting
 28 it.

1 The party opposing summary judgment and seeking to postpone the court's ruling on the
 2 motion must identify how the party will obtain the necessary evidence within a reasonable time.
 3 *Tatum*, 441 F.3d at 1101. To date, Parrish has not conducted any discovery. (Decl. Kenny ¶ 2.)
 4 Parrish provides no estimate of what he must do to obtain the inmates' declarations he seeks, or
 5 how long it will take to get the declarations. He provides no estimate of how many documents he
 6 seeks related to Defendants' personnel files, and inmates' complaints and grievances.

7 Because Parrish has not justified his failure to conduct discovery, and because he provides
 8 no estimation of how much discovery he seeks and how long it will take, this Court should grant
 9 Defendants' summary-judgment motion.

10 **D. Parrish Has Made No Showing That The Requested Discovery Will Defeat**
 11 **Defendants' Summary-Judgment Motion.**

12 Parrish argues that he needs Defendants' personnel files, and inmates' declarations,
 13 complaints, and grievances to oppose Defendants' motion. But the evidence that Parrish seeks
 14 will not create a triable issue of material fact.

15 The party opposing summary judgment and seeking to postpone the court's ruling on the
 16 motion must identify how the evidence will defeat summary judgment. *Tatum*, 441 F.3d at 1101.
 17 As Defendants addressed in greater detail in I.A., because the evidence Parrish seeks is
 18 inadmissible character evidence and hearsay, it can not create a triable issue of material fact.
 19 Because the evidence that Parrish seeks will not create a triable issue of material fact, this Court
 20 should deny Parrish's request for a postponement and grant Defendants' summary-judgment
 21 motion.

22 **CONCLUSION**

23 Parrish has failed to create a triable issue of material fact in opposition to Defendants'
 24 summary-judgment motion, or to show good cause to postpone ruling on the motion. This Court
 25 should address the threshold issue of qualified immunity before authorizing the far-reaching
 26 discovery he seeks. And even if Defendants' invocation of qualified immunity did not stay
 27 discovery, Parrish's time to conduct discovery has ended. Parrish has had since March 2011 to
 28 conduct the discovery he now seeks. He has not done so. This Court gave him every opportunity

1 to do so, including advising him that he could in its screening order. Even if Parrish obtained the
2 discovery, it would amount to inadmissible hearsay and character evidence, which would not
3 create a triable issue of material fact. Because Parrish's eleventh-hour discovery request is
4 insufficient to defeat or postpone summary judgment, this Court should grant the motion.

5 Dated: February 28, 2012

Respectfully submitted,

6 KAMALA D. HARRIS
7 Attorney General of California
MICHAEL W. JORGENSEN
8 Supervising Deputy Attorney General

9 /s/ Brendan M. Kenny

10 BRENDAN M. KENNY
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14 and Solis*

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CERTIFICATE OF SERVICE

Case Name: K. Parrish v. A. Solis, et al. No. C 11-1438 LHK

I hereby certify that on February 28, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' REPLY REGARDING SUMMARY-JUDGMENT MOTION

DECLARATION OF BRENDAN KENNY IN SUPPORT OF DEFENDANTS' REPLY REGARDING SUMMARY-JUDGMENT MOTION

[PROPOSED] ORDER GRANTING DEFENDANTS' SUMMARY-JUDGMENT MOTION

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On February 28, 2012, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Kaheal Parrish (F-15901)
Salinas Valley State Prison
P.O. Box 1050
Soledad, CA 93960-1050
In Pro Se

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 28, 2012, at San Francisco, California.

M. Luna

Declarant

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/s/ M. Luna

Signature